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WASHINGTON, D.C. 20231
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In re application of

Fukui et al.

Serial No. 09/989,682

Filed: November 20, 2001

For: PACKAGING OF RESPIRING BIOLOGICAL
MATERIALS

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DECISION ON
PETITION

This is a decision on the PETITION UNDER 37 CFR 1.181 TO WITHDRAW THE FINALITY OF THE OFFICE ACTION, dated September 13, 2006.

On March 31, 2004 a Non-Final Office Action was mailed to Applicants. Applicant's filed two non-compliant Amendments on August 19, 2004 and December 2, 2004. On May 26, 2005 an Amendment was filed by Applicants. On October 4, 2005 a Requirement for Restriction was mailed to Applicants. On January 25, 2006 an Amendment was filed by Applicants. On June 16, 2006, a Final Office Action was mailed to Applicants. On September 14, 2006 an After Final Amendment along with the instant Petition and a Notice of Appeal was filed by Applicants.

Petitioner has argued that the finality of the last Office Action on June 16, 2006 is improper. Petitioner argues that the Examiner has not clarified what Applicant's Admission of the Prior Art was relied upon, thus no clear issue has been developed. Petitioner further argues that there is no rejection based on Shimizu as argued by Examiner in the Final Office Action, thus no clear issue has been developed. Petitioner also argues that not all the claim limitations have been addressed by the Examiner and Petitioner argues that the statement by Examiner that "The rejection is based on what the art taken as a whole teaches..." does not comply with the statute.

DECISION

Section 706.07(a) of the MPEP states:

706.07(a) Final Rejection, When Proper on Second Action

Due to the change in practice as affecting final rejections, older decisions on questions of prematurity of final rejection or admission of subsequent amendments do not necessarily reflect present practice.

Under present practice, second or any subsequent actions on the merits shall be final, except where the examiner introduces a new ground of rejection that is neither necessitated by applicant's amendment of the claims nor based on information submitted in an information disclosure statement filed during the period set forth in 37 CFR 1.97(c) with the fee set forth in 37 CFR 1.17(p). Where information is submitted in an information disclosure statement during the period set forth in 37 CFR 1.97(c) with a fee, the examiner may use the information submitted, e.g., a printed publication or evidence of public use, and make the next Office action final whether or not the claims have been amended, provided that no other new ground of rejection which was not necessitated by amendment to the claims is introduced by the examiner. See MPEP § 609.04(b). Furthermore, a second or any subsequent action on the merits in any application or patent undergoing reexamination proceedings will not be made final if it includes a rejection, on newly cited art, other than information submitted in an information disclosure statement filed under 37 CFR 1.97(c) with the fee set forth in 37 CFR 1.17(p), of any claim not amended by applicant or patent owner in spite of the fact that other claims may have been amended to require newly cited art. Where information is submitted in a reply to a requirement under 37 CFR 1.105, the examiner may NOT make the next Office action relying on that art final unless all instances of the application of such art are necessitated by amendment.

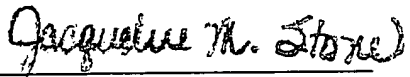
Petitioner argues that the rejection under 35 USC 103 over Cummin in view of Applicant's Admission of the Prior Art (APA), further in view of Herdeman, Badran '542, Scolaro, Badran '544, De Moor, Anderson, Antoon, and Shimizu is unclear in that there is no statement of what the Examiner regards as having been admitted by the Application and what the alleged admission is relied upon to teach, thus no clear issue has been developed.

Petitioner argues that the Final Office Action includes a statement that the claims are also rejected employing Shimizu as the primary reference, however there is no rejection of the claims using Shimizu as the primary reference.

Petitioner argues that the Office Action does not address the feature of "the sealed polymeric bag containing the bananas has an oxygen permeability at 13°C per kg of bananas in the package (OP13/kg) of at least 700 ml/atm.24 hr" or to a number of other features present in dependent claims. Petitioner further argues that the rejection does not comply with the statute because it is based on what the art taken as a whole teaches.

Petitioner's arguments are persuasive. The Finality of the Office Action filed on June 16, 2006 is withdrawn. The instant Application is being forwarded to the Examiner in order to clarify the issues of record as stated above.

Accordingly, the Petition for the withdrawal of finality is **GRANTED**.



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